

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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DEBORAH D. PETERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 01-2094 (RCL)
	)	
THE ISLAMIC REPUBLIC OF IRAN, et al.,	)	
	)	
Defendants.	)	
	)	

## UNITED STATES' STATEMENT IN RESPONSE TO ORDER OF JUNE 25, 2008

In three separate motions, Plaintiffs move this Court for an order for payment of Special Masters John Swanson, Loraine Ray, and Karen Kruger pursuant to 28 U.S.C. § 1605A(e). This Court requested that the United States file a memorandum addressing certain issues relevant to the proper resolution of those motions. *See* Order of June 25, 2008 [Dkt. No. 365]. Specifically, the United States was asked to address (1) the Court’s authority to order such payments; (2) the procedures the Court should follow in deciding whether to direct that such payments be made; (3) the determination of the amount of the payments; and (4) possible retroactivity questions. In compliance with the Court’s Order, the United States submits this statement and respectfully requests, for the reasons stated herein, that the Court deny Plaintiffs’ motions.

## FACTUAL BACKGROUND

Plaintiffs in these actions are family members of the 241 servicemen who died in the Marine barracks bombing in Beirut, Lebanon on October 23, 1983, and the injured survivors of the attack. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 48 (D.D.C. 2003). On October 3 and December 28, 2001, Plaintiffs filed two actions in this Court under the Foreign

Sovereign Immunities Act. *See* 28 U.S.C. § 1605(a)(7). Following a hearing, this Court held that Defendants, the Islamic Republic of Iran and the Iranian Ministry of Information and Security, were jointly and severally liable to Plaintiffs for compensatory and punitive damages. This Court appointed Special Masters pursuant to Rule 53 of the Federal Rules of Civil Procedure to assist the Court in its determination of the proper award for each Plaintiff. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d at 61. After receiving the reports from the Special Masters, this Court awarded a Default Judgment in favor of Plaintiffs in the amount of \$2,656,944,877.00. *See Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 60 (D.D.C. 2007).

Plaintiffs subsequently moved for an order for payment of the Special Masters appointed in this action pursuant to a statutory provision enacted January 28, 2008. *See* Motion for Order for Payment of Special Master John C. Swanson (filed Apr. 22, 2008) [Dkt No. 243]; Motion for Order of Payment of Special Master Loraine A. Ray, Esq. (filed Apr. 22, 2008) [Dkt. No. 242]; Motion for Order for Payment of Special Master Karen J. Kruger, Esq. (filed May 1, 2008) [Dkt. No. 253]. All of the fees and expenses incurred by the Special Masters pre-date enactment of the statutory provision upon which Plaintiffs rely.

### **STATUTORY BACKGROUND**

In 1996, Congress amended the Foreign Sovereign Immunities Act to abrogate in certain respects the sovereign immunity of a foreign sovereign designated a sponsor of terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7)). As amended, Section 1605(a)(7) provides in relevant part that a foreign state is not immune from a damages action in the United States “for personal injury . . . caused by an act of torture . . . [or] hostage taking” to a U.S. national if such foreign state had been “designated as a state sponsor of terrorism . . . at the time the act

occurred” and was afforded “a reasonable opportunity to arbitrate the claim.” 28 U.S.C. § 1605(a)(7). Plaintiffs filed the instant action pursuant to that authority.

The National Defense Authorization Act for Fiscal Year 2008 (“NDAA”) enacted into law January 28, 2008, repeals Section 1605(a)(7) and adds the statutory provision now codified at Section 1605A of Title 28. *See* NDAA, Pub. L. No. 110-181, 122 Stat 3 (Jan. 28, 2008) (explaining that the Act contains “certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code”). In addition to providing a terrorism exception to the sovereign immunity of a foreign state, Section 1605A also authorizes the appointment of special masters to hear damages claims brought under the section. *See* 28 U.S.C. § 1605A(e)(1). That provision further provides that the

Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1).

28 U.S.C. § 1605A(e)(2). Section 10603c in turn provides that the Director of the Office for Victims of Crime “may use the emergency reserve referred to in section 10601(d)(5)(A) of this title to carry out a program to compensate victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization.” 42 U.S.C. § 10603c.

Pursuant to its authority in 42 U.S.C. § 10604 and 42 U.S.C. § 10605, the Office for Victims of Crime established Guidelines for the “administration of funding for response to victims of terrorism or mass violence” as originally authorized in 42 U.S.C. § 10603b and § 10603c. *See* 67 Fed. Reg. 4822 (Jan. 31, 2002). Those Guidelines predate the enactment of 28 U.S.C. § 1605A(e)(2) in 2008, and therefore do not address implementation of that provision. The Director of the Office for Victims of Crime has not yet established a process for implementing the new Special Masters provision of the NDAA. *See* Declaration of John Gillis,

Director of the Office for Victims of Crime (“Gillis Decl.”) ¶ 5. However, the Director anticipates that the process will be based on a reimbursement system, whereby the Administrator of the United States District Court in which an action pursuant to Section 1605A is pending would submit to the Office for Victims of Crime expense claims related to the action, together with appropriate verification, for reimbursement. *Id.* Claims for expenses incurred before the enactment date of Section 1605A will not be accepted. *Id.*

### **ARGUMENT**

The sole authority on which the instant motions are predicated is 28 U.S.C. § 1605A(e). *See, e.g.,* Memorandum in Support of Motion for Order for Payment of Special Master John C. Swanson (filed Apr. 22, 2008) [Dkt. No. 243] (stating in its entirety that “Plaintiffs cite in support of their Motion For Order For Payment, the provisions of 28 U.S.C. § 1605A(e) providing for payment from funds available under § 1404C of the Victims of Crime Act of 1984 (42 U.S.C. § 10603c).”). Section 1605A(e), however, is not available to Plaintiffs, and therefore the Court should deny their motion.

#### **I. PLAINTIFFS’ ACTION WAS NOT FILED UNDER SECTION 1605A AND THEREFORE SECTION 1605A(e) IS INAPPLICABLE.**

Plaintiffs filed this action pursuant to 28 U.S.C. § 1605(a)(7), not 28 U.S.C. § 1605A. *See Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d at 59. Section 1605A(e) provides for the transfer of funds for the payment of Special Masters only in pending cases “brought or maintained under *this section*.” 28 U.S.C. § 1605A(e)(2) (emphasis added). The D.C. Circuit recently clarified that the phrase “filed under this section” in Section 1605A does not refer to cases filed, as here, under Section 1605(a)(7) of the pre-amendment Act. *See Simon v. Republic of Iraq*, \_\_\_ F.3d \_\_\_, 2008 WL 2497417, at \*4 (D.C. Cir., June 24, 2008) (explaining that “a pending case obviously cannot be said to have been ‘filed under’ the new provision”).

“Therefore, the plaintiff in a case pending under § 1605(a)(7) may not maintain that action based upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision.” *Id.* Given that Plaintiffs’ action was not filed under the new provision, they cannot avail themselves of its Special Masters provision.

That result is compelled, moreover, by the presumption against retroactive application of statutes. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 237 (1995) (admonishing that “statutes do *not* apply retroactively *unless* Congress expressly states that they do” (emphasis in original)); *see also Landraf v. USI Film Prods.*, 511 U.S. 244, 284-85 (1994); *Simon*, 2008 WL 2497417, at \*3. The fees and expenses for which Plaintiffs seek payment all were incurred before enactment of Section 1605A(e). *See, e.g.*, Voucher of Special Master Requesting Payment of Fees and Expenses (filed Apr. 22, 2008) [Dkt. No. 243-2]; Voucher of Special Master Requesting Payment of Fees and Expenses (filed Apr. 22, 2008) [Dkt. No. 242-2]; Voucher of Special Master Requesting Payment of Fees and Expenses (filed May 1, 2008) [Dkt. No. 253-2]. Thus, Plaintiffs invite the Court to apply a newly enacted statutory provision to past conduct.<sup>1</sup> But Congress did not expressly provide for such retroactive application, and indeed the language of Section 1605A(e) precludes such (*see* discussion, *supra*). Plaintiffs’ Motion should therefore be denied.

## **II. THE OFFICE FOR VICTIMS OF CRIMES IS STATUTORILY AUTHORIZED TO ESTABLISH PROCEDURES FOR ADMINISTRATION OF THE FUNDS AVAILABLE UNDER 42 U.S.C. § 10603c.**

The procedures for effecting the transfer of funds contemplated in Section 1605A(e) will

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<sup>1</sup> Under those circumstances, such an Order would effect the obligation of funds for expenses incurred at a time when Congress had not appropriated funds for their payment. *See Rochester Pure Waters District v. Environmental Protection Agency*, 960 F.2d 180, 184 (D.C. Cir. 1992) (“It is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation.”).

be established by the Office for Victims of Crimes. *See* 28 U.S.C. § 1605A(e)(2) (providing that “[t]he Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1)”). That Section was enacted against a pre-existing statutory and regulatory framework governing administration of payments authorized by 42 U.S.C. § 10603c. Congress authorized the Director of the Office for Victims of Crimes to “establish such rules, regulations, guidelines, and procedures as are necessary to carry out any function of the Director under this chapter.” 42 U.S.C. § 10604(a); *see also* 42 U.S.C. § 10605(a)-(c) (establishing within the Department of Justice an Office for Victims of Crime that is headed by a Director (“referred to in this chapter as the ‘Director’”) and providing that the Director shall “[e]stablish[] programs in accordance with section 10603c of this title”). One such function is set forth in 42 U.S.C. § 10603c which provides that

The Director may use the emergency reserve referred to in section 10601(d)(5)(A) of this title to carry out a program to compensate victims of acts of international terrorism that occur outside the United States for expenses associated with that victimization. The amount of compensation awarded to a victim under this subsection shall be reduced by any amount that the victim received in connection with the same act of international terrorism under title VIII of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.

42 U.S.C. § 10603c. Nothing in Section 1605A(e) purports to eliminate these functions of the Director of the Office for Victims of Crimes. Thus, the Director has responsibility for establishing procedures for implementation of reimbursements authorized by the Section.

Such procedures, however, are not yet in place. *See* Gillis Decl. ¶ 5. The Director intends to establish a reimbursement system for payments pursuant to Section 1605A(e)(2) whereby the Administrator of the United States District Court in which a Section 1605A action

is pending would submit to the Office for Victims of Crimes expense claims related to the action, together with appropriate verification, for reimbursement. *Id.* Thus, in an appropriate action, this Court could upon a motion such as the instant one order the Court Administrator to submit a claim for reimbursement of a Special Master appointed pursuant to Section 1605A(e)(1). The Court, however, could not consistent with the authority delegated the Director order that a specified sum be paid out of the fund. *See Rochester Pure Waters District*, 960 F.2d at 185 (noting that “Congress has ‘absolute control of the moneys of the United States’”). Any such payment instead would be made consistent with the procedures established by the Director.

### CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Plaintiffs’ Motions for Order for Payment of Special Masters.

Date: July 25, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing United States' Statement in Response to Order of June 25, 2008 was filed through the ECF system via the ECF generic email box for the United States District Court for the District of Columbia, and was also provided via email to counsel of record on this date.

/s/ Heather Phillips

HEATHER R. PHILLIPS

**THE UNITED STATES DISTRICT COURT  
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DEBORAH D. PETERSON, et al.,

Plaintiffs,

V.

THE ISLAMIC REPUBLIC OF IRAN, et al.,

**Defendants.**

Civil Action No. 01-2094 (RCL)

## DECLARATION OF JOHN GILLIS

**I, John Gillis, declare and state as follows:**

1. My name is John Gillis, Director of the Office for Victims of Crime (OVC), Office of Justice Programs, Department of Justice. I was appointed by the President, and confirmed by the Senate in 2001, to head OVC.

2. The Office for Victims of Crime was formally established in 1988 through an amendment to the 1984 Victims of Crime Act (VOCA) to provide leadership and funding on behalf of crime victims. The mission of OVC is to enhance the Nation's capacity to assist crime victims and to provide leadership in changing attitudes, policies, and practices to promote justice and healing for all victims. OVC provides federal funds to support victim compensation and assistance programs across the Nation. OVC also provides training for diverse professionals who work with victims, develops and disseminates publications, supports projects to enhance victims' rights and services, and educates the public about victim issues. The funding to do all this

comes from the Crime Victims Fund (CVF), created by the VOCA.<sup>1</sup>

3. The Crime Victims Fund is a permanently appropriated fund containing criminal fines and penalties collected by the Federal government, rather than tax payer revenue. Since Fiscal Year 2000, the Department of Justice appropriations bill has contained a limitation on how much CVF money can be spent in that particular fiscal year. The FY 2008 obligation limitation is \$590 million. As a result of this spending limitation, there are excess CVF funds of approximately \$1.3 billion, of which \$50 million is set aside and available for emergencies and expenses for victims of terrorism in the Antiterrorism Emergency Reserve Fund. This \$50 million is available in addition to the annual obligation limitation created in the Department of Justice appropriations bill.

4. On January 28, 2008, the National Defense Authorization Act for Fiscal Year 2008 became Public Law 110-181. Section 1083 of the Act amended Title 28, United States Code, to create a new section 1605A, Terrorism Exception to the Jurisdictional Immunity of a Foreign State. This new section 1605A included subsection 1605A(e), which requires the Attorney General to transfer funds available for the program under section 1404C of VOCA (i.e. the Antiterrorism Emergency Reserve Fund) "to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section."<sup>2</sup>

5. At this time, the Department has not formally created a process implementing this new law, but I intend to base the process on a reimbursement system, whereby the Administrator of the appropriate United States district court would submit to my Office expense claims related to the cases, together with appropriate verification, for reimbursement. My Office will accept

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<sup>1</sup>Victims of Crime Act, Pub. Law No. 98-473, as amended.

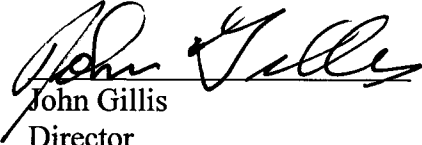
<sup>2</sup>Pub. Law No. 110-181, section 1083(a)(1).

claims that arise from reasonable, allowable and allocable expenses incurred on or after January, 28, 2008, the date this new provision became law.

6. I expect to have guidelines outlining reasonable, allowable and allocable expenses completed by December 15, 2008.

I declare under the penalty of perjury that the foregoing 6 paragraphs are true and correct.

Date: July 25, 2008

  
John Gillis  
Director  
Office for Victims of Crime